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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/812,160	03/29/2004	Simon J. Porter	H0002969 C1 (4760)	2480

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EXAMINER
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NORDMEYER, PATRICIA L

ART UNIT	PAPER NUMBER
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1772

DATE MAILED: 06/24/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

10/812,160

Applicant(s)

PORTER, SIMON J.

Examiner

Patricia L. Nordmeyer

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 38-42 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 38-42 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_.
- ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_.
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: \_\_\_\_.

## DETAILED ACTION

### *Double Patenting*

1. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

2. Claims 1 – 8, 14 – 28, 30, 31 and 38 – 41 are rejected under the judicially created doctrine of double patenting over claims 1 – 20 of U. S. Patent No. 6,447,892 since the claims, if allowed, would improperly extend the "right to exclude" already granted in the patent.

The subject matter claimed in the instant application is fully disclosed in the patent and is covered by the patent since the patent and the application are claiming common subject matter, as follows: a multilayered film containing nylon with sealant and protective layers attached to it for use in packaging meat items.

Furthermore, there is no apparent reason why applicant was prevented from presenting claims corresponding to those of the instant application during prosecution of the application which matured into a patent. See *In re Schneller*, 397 F.2d 350, 158 USPQ 210 (CCPA 1968). See also MPEP § 804.

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3. Claims 38 – 32 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1 – 30 of U.S. Patent No. 6,726,968 to Porter. Although the conflicting claims are not identical, they are not patentably distinct from each other because Porter discloses a multi-layer film made with a nylon film, sealant film, an antifog composition contained within or coated on the sealant film and a protective film (Column 11, lines 55 – 61). The nylon film comprises nylon 6 (Column 12, lines 32 – 35), and the protective film is chosen from polyvinylidene chloride, polyurethanes, amine modified polyurethanes, epoxies, polyesters, acrylics, polyols and combinations thereof (Column 12, lines 44 – 48). The film may be used in combination with a container having an open portion, wherein the container is used to hold a food product such as meat (Column 9, lines 8 – 16).

4. Claims 38 - 42 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1 – 20 of U.S. Patent No. 6,447,892 in view of U.S. Patent no. 5,837,358 to Bauer et al.

Hatley et al. disclose a multilayered film (Column 8, line 55) with a nylon film wherein the film has first and second surface and the film has a first layer of nylon, an ethylene vinyl alcohol layer and a second nylon layer (Column 9, lines 56 – 58). Attached to one side of the nylon composite with adhesive is a sealant film where the sealant film either is coated on a surface or contains an antifog composition (Column 9, lines 58 – 62 and Column 10, lines 51 – 52) made with glycerol monoesters of a saturated or unsaturated fatty acid have 8 to 20 carbon atoms, glycerol diesters of a saturated or unsaturated fatty acid have 8 to 20 carbon atoms,

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sorbitan esters or ionic surfactants having phosphate, sulfate, or quaternary amine function end groups (Column 6, lines 6 – 15). The sealant film is also attached through lamination to the nylon film (Column 10, lines 9 – 10). A protective film of polyvinylidene chloride (Column 8, lines 20 – 24) or polyurethane (Column 5, line 35) is attached through coating (Column 4, lines 27 – 29) to give the multilayer film better oxygen barrier characteristics. The sealant film is made from a low-density polyethylene, linear low-density polyethylene, or high-density polyethylene (Column 5, lines 11 – 20). The nylon film is made from nylon 6, nylon 6,6 or nylon 6/6,6 (Column 3, lines 46 – 48) and is either uniaxially or biaxially oriented (Column 4, lines 57 – 64). Many adhesives are used as the intermediate including polyurethanes, epoxies, polyesters, acrylics, anhydride modified polyolefins and blends thereof (Column 6, lines 31 – 35). The multilayered film is heat shrinkable by an amount of 2 to 30% in its width or both the width and length (Column 7, lines 14 – 17), contains printed indicia on the nylon film (Column 7, lines 22 – 25) and has an oxygen transmission rate of 0.1 cc/100 in<sup>2</sup>/day or less (Column 7, lines 7 – 13). The film is used as part of a food package containing a food product such as beef, pork and poultry where the film covers an open portion of the container and seals it (Column 7, lines 36 – 46).

### ***Claim Rejections - 35 USC § 102***

5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an

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international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

6. Claims 38 – 42 are rejected under 35 U.S.C. 102(e) as being anticipated by Hatley et al. (USPN 6,447,892).

The applied reference has a common assignee with the instant application. Based upon the earlier effective U.S. filing date of the reference, it constitutes prior art under 35 U.S.C. 102(e). This rejection under 35 U.S.C. 102(e) might be overcome either by a showing under 37 CFR 1.132 that any invention disclosed but not claimed in the reference was derived from the inventor of this application and is thus not the invention “by another,” or by an appropriate showing under 37 CFR 1.131.

Hatley et al. disclose a multilayered film (Column 8, line 55) with a nylon film wherein the film has first and second surface and the film has a first layer of nylon, an ethylene vinyl alcohol layer and a second nylon layer (Column 9, lines 56 – 58). Attached to one side of the nylon composite with adhesive is a sealant film where the sealant film either is coated on a surface or contains an antifog composition (Column 9, lines 58 – 62 and Column 10, lines 51 – 52) made with glycerol monoesters of a saturated or unsaturated fatty acid have 8 to 20 carbon atoms, glycerol diesters of a saturated or unsaturated fatty acid have 8 to 20 carbon atoms, sorbitan esters or ionic surfactants having phosphate, sulfate, or quaternary amine function end groups (Column 6, lines 6 – 15). The sealant film is also attached through lamination to the nylon film (Column 10, lines 9 – 10). A protective film of polyvinylidene chloride (Column 8, lines 20 – 24) or polyurethane (Column 5, line 35) is attached through coating (Column 4, lines 27 – 29) to give the multilayer film better oxygen barrier characteristics. The sealant film is

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made from a low-density polyethylene, linear low-density polyethylene, or high-density polyethylene (Column 5, lines 11 – 20). The nylon film is made from nylon 6, nylon 6,6 or nylon 6/6,6 (Column 3, lines 46 – 48) and is either uniaxially or biaxially oriented (Column 4, lines 57 – 64). Many adhesives are used as the intermediate including polyurethanes, epoxies, polyesters, acrylics, anhydride modified polyolefins and blends there of (Column 6, lines 31 – 35). The multilayered film is heat shrinkable by an amount of 2 to 30% in its width or both the width and length (Column 7, lines 14 – 17), contains printed indicia on the nylon film (Column 7, lines 22 – 25) and has an oxygen transmission rate of 0.1 cc/100 in<sup>2</sup>/day or less (Column 7, lines 7 – 13). The film is used as part of a food package containing a food product such as beef, pork and poultry where the film covers an open portion of the container and seals it (Column 7, lines 36 – 46).

***Claim Rejections - 35 USC § 103***

7. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

8. Claims 38 – 42 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bauer et al. (USPN 5,837,358).

Bauer et al. disclose a multi-layered film (Column 29, line 51) with a nylon 6, nylon 66 or nylon 6/66 core containing with two surfaces (Column 3, lines 29 – 35 and 41) where layers

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are attached (Column 29, lines 51 – 54). The first layer, the sealant film, is made from low density polyethylene, linear low density polyethylene, very low and ultra low density polyethylene (Column 10, lines 5 – 9 and 19 – 20), and the second layer, the protective layer, is made from polyurethane, polyvinylidene chloride and polyester (Column 13, lines 34 – 43). The layers are either attached directly to the nylon core the lamination and coating (Column 10, lines 53 – 61) or with an adhesive, tie, layer (Column 11, lines 17 – 19). The film is a biaxially oriented film with heat shrinkable characteristics (Column 2, lines 52 – 55) of 20 to 50% in the biaxial directions (Column 5, lines 7 – 8) and low oxygen permeability (Column 5, line 7). Bauer et al. disclose a multilayer film having 2 to 20 layers (Column 12, lines 5 – 8), so a fourth layer of polyurethane is added between the core and protective layer (Column 30, lines 15 – 20). The intermediate, or tie, layer is made from polyurethane, ethylene acrylic acid or anhydride modified polyolefins (Column 14, lines 1 – 17). The first three layers are chosen from a variety of materials including ethylene vinyl alcohol or polyamide, nylon, (Column 13, lines 12 – 67). Additional tie layers, heat sealable polyolefin layers (Column 30, lines 20 – 51), and alpha olefin monomers of 2 to 6 carbon atoms are added to make the desired film (Column 9, lines 17 – 18). Once the film is formed, it is stored in the form of a roll (Column 29, lines 11 – 15). The film is used in a thermoformed package as a lidstock film to package meat products such as pork, beef, lamb and poultry (Column 22, lines 21 – 25 and 46 – 51). However, Bauer et al. fail to disclose a food package made with a container having an open portion and the multi-layer film sealing the open portion.

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It would have been obvious to one of ordinary skill in the art at the time the applicant's invention was made to have provided a container with an open portion covered with a multi-layer film to store a meat since the film of Bauer et al. is used to wrap a meat product to keep it fresh. Therefore, the film is performing an equivalent function to the film and container combination.

### *Conclusion*

9. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

U.S. Patent No. 6,444,758 to McNamara et al., U.S. Patent No. 6,106,935 to Lambert et al., U.S. Patent No. 4,640,852 to Ossian, U.S. Patent No. 4,501,798 to Koschak et al. and U.S. Patent No. to 6,342,282 to Yoshii et al. are cited to show the state of the art.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Patricia L. Nordmeyer whose telephone number is (571) 272-1496. The examiner can normally be reached on Mon.-Thurs. from 7:00-4:30 & alternate Fridays.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Harold Y. Pyon can be reached on (571) 272-1498. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Patricia L. Nordmeyer

Examiner

Art Unit 1772

*pln*  
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HAROLD PYON  
SUPERVISORY PATENT EXAMINER  
1772

6/21/04